

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LAWRENCE E. RAY,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
SF07528410616-1

DATE: JUL 6 1987

Lawrence E. Ray, Industry, Texas, pro se.

John A. Townsend, Point Mugu, California, for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

Member Devaney issues a separate concurring opinion.

OPINION AND ORDER

The appellant petitions for review of a remand initial decision that sustained his removal for misconduct and poor performance related to a mental disability. The petition for review is DENIED for failure to satisfy the criteria for review set forth at 51 Fed. Reg. 25,158 (1986) (to be codified at 5 C.F.R. § 1201.115).¹ The Board REOPENS the

¹ On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

initial decision on its own motion, 5 C.F.R. § 1201.117, and the initial decision is AFFIRMED as MODIFIED.

BACKGROUND

The agency removed appellant from the position of Systems Accountant, GS-11, effective March 23, 1984, based on the following: (1) Mental disability; (2) misconduct; and (3) poor performance. The agency based the action on (1) a psychiatric evaluation of appellant that stated appellant exhibited major depression, recurrent with psychotic features, and a paranoid personality disorder, and (2) previous incidents of alleged misconduct and poor performance.

Appellant appealed to the Board's San Francisco Regional Office, and an administrative judge² of that office affirmed the removal action. Specifically, he found the following: (1) That the agency properly used Chapter 75 procedures to remove appellant because the action was based on both performance and nonperformance factors; (2) that the agency proved by preponderant evidence that appellant was mentally disabled from performing the required duties of his position; (3) that the agency proved the charge of misconduct by preponderant evidence; (4) that appellant's performance in one critical element of his position was unacceptable, and that he was given a reasonable opportunity to improve; and (5) that appellant failed to prove his

² Effective May 8, 1986, the working title of the attorney-examiners in the Board's regional offices was changed from "presiding official" to "administrative judge."

affirmative defense of discrimination by preponderant evidence.

In his petition for review,³ appellant disputes the findings of disability, denies having engaged in misconduct, asserts that he was not provided with counseling or progressive discipline, claims "entrapment," and seeks compensatory damages.⁴

³ After filing his petition for review, and after the agency responded to that petition, appellant filed a response to the agency's response. The record closed before appellant filed his second submission, however, see 5 C.F.R. § 1201.114(i) (record closes upon expiration of the period for filing the response to the petition for review), and we therefore have not considered appellant's response. As we have stated below, however, we have considered the brief appellant submitted in response to a subsequent Board order.

⁴ Appellant also states that the agency, in its proposal notice, referred to his proposed removal from his position, rather than his proposed removal from the installation. We note, however, that the proposal notice also includes a statement that the agency was unable to locate any suitable positions in which he could be placed. We therefore find no basis in this allegation for granting the petition for review.

After the petition was filed, the United States Court of Appeals for the Federal Circuit issued its decision in *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985), cert. denied, 106 S. Ct. 1523 (1986), holding that Chapter 75 "remains available for performance-based adverse actions," despite the enactment of Chapter 43. *Id.* at 843. Because of the possibility that that decision could have affected the outcome of this appeal, the parties were afforded an opportunity to submit briefs addressing any such effect. Both parties did so, and we have reviewed the briefs they submitted. We find, however, that the agency properly brought the action under Chapter 75, rather than Chapter 43, because the adverse action was based on both performance and nonperformance factors. See 5 C.F.R. § 752.401(a)(2).

ANALYSIS

With respect to appellant's first two contentions, mere disagreement with the fact-findings of the administrative judge does not warrant full Board review of the record. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (mere disagreement with the administrative judge's findings, credibility determinations, and conclusions does not warrant full review of the record by the Board).

Appellant's assertion that the agency failed to counsel him regarding his misconduct and poor performance is also without merit. The Board has recently held in *Fairall v. Veterans Administration*, MSPB Docket No. CH07528310623-1 (Mar. 12, 1987) that an employee subject to a performance-based adverse action under Chapter 75 has no statutory right to a performance improvement period. In any case, the administrative judge specifically found that appellant's "unacceptable conduct and behavior became a continuing problem and efforts by agency officials to correct the problem through advice, counsel, and progressive disciplinary action were to no avail." Initial Decision at 4. The record contains ample evidence to support the administrative judge's finding that appellant was afforded an opportunity to improve. The agency issued letters of caution, reprimand, and requirement to appellant regarding his misconduct and provided appellant with a forty-five day period in which to improve his unsatisfactory performance.

Appellant's allegation of entrapment is completely unsupported by any specific references to the record, and does not, therefore, warrant full Board review of the case. Furthermore, there are no statutory or regulatory provisions that permit payment of compensatory damages to an appellant under the circumstances.

DECISION

The initial decision is hereby AFFIRMED as MODIFIED by this Opinion and Order. This is the final order of the Merit System Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have one of several alternatives to choose from if you want further review of this decision.

Discrimination Claims

You may petition the Equal Employment Opportunity Commission (EEOC) to consider the Board's decision on your discrimination claims, and still preserve any right you may have to judicial consideration of your discrimination claims or your other claims. 5 U.S.C. § 7702(b)(1). The address of the EEOC is 2401 E Street, N.W., Washington, D.C. 20506. The law is unsettled regarding the time limit for filing where a party is represented. Therefore, you must file a petition with the EEOC no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7702(b)(1).

If you do not petition the EEOC for consideration of the Board's decision on your discrimination claims, or if you do petition the EEOC and it affirms the Board's decision in your appeal, you may choose to file a civil action on both your discrimination claims and your other claims in an appropriate United States district court. 5 U.S.C. § 7703(b)(2). The law is unsettled regarding the time limit for filing where a party is represented. Therefore, if you elect to file a civil action without first petitioning the EEOC, you must file a petition with the district court no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to request waiver of any requirement of prepayment of fees, costs, or other security. 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.


Other Claims

If you choose not to seek review of the Board's decision on your discrimination claims, you may petition the United States Court of Appeals for the Federal Circuit to review the decision on issues other than prohibited discrimination, if the court has jurisdiction. 5 U.S.C. § 7703(b)(1). The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The law is unsettled regarding the time limit for filing where a party is

represented. Therefore, you must file a petition with the court no later than thirty days after receipt of this order by you or your representative, whichever occurs first. 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.

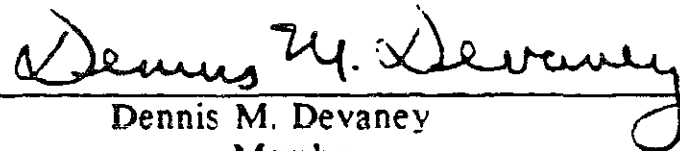

Robert E. Taylor
Clerk of the Board

OPINION OF BOARD MEMBER DENNIS M. DEVANEY
CONCURRING IN THE RESULT OF THE OPINION AND ORDER

I concur in the result in this case. However, I reiterate my view in *Fairall v. Veterans Administration*, MSPB Docket No. CH07528310623-1 (April 1, 1987), that generally performance-based actions must include a reasonable opportunity to improve. I also reiterate my view that the exception to this rule set out in *Gende v. Department of Justice*, 84 FMSR 5869; 23 M.S.P.R. 615-616 (1984), i.e., that such an opportunity would not be required where it might result in injury, death, breach of security, or great monetary loss, is conceptually sound and should be followed. The facts in this case illustrate the need for such an exception. For the agency to have provided the appellant an opportunity to improve knowing that a psychiatric fitness-for-duty examination found that the appellant was mentally unfit to perform would have been a meaningless gesture.

JUL 6 1987

Date



Dennis M. Devaney
Member

Washington, D.C.